Freedom
The legacy of early modern scholasticism to contract law

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By taking the audacious step of publishing James Gordley's volume on the *Philosophical Origins of Modern Contract Doctrine* in 1991, Oxford University Press must have thought itself to be taking a well-calculated risk. After all, owing to the bright new ideas it contains, Gordley's book promised not only to become a best-seller for its own part, but, in addition, to usher in the very lucrative business of re-writing and re-editing many a traditional textbook on the history of private law in both civil and common law countries. Until that point in time, claiming that the cradle of modern contract doctrine was to be found in the massive treatises *De iustitia et iure* of moral theologians like Soto, Lessius, and Molina rather than in the natural law treatises of Grotius, Pufendorf and their likes had been a rather experimental, and marginal enterprise[1]. Fifteen years on, OUP seems to have been sufficiently delighted about the intrinsic qualities and success of the *Philosophical Origins* to further enhance the prospects of attaining its second objective by bringing a new book on to the market[2]. In 2006, James Gordley's new publication, *Foundations of Private Law. Property, tort, contract, unjust enrichment* re-affirmed the key message of the *Philosophical Origins*, namely that it is rewarding and useful to change our minds about the history of contract law, not only for purely historical reasons, but also on the grounds that acknowledging the Aristotelian-Thomistic roots of the private law in the civil codes proves to be very useful in finding answers to present day dissatisfaction in applying the law of those codes. Orphanized, that is cut off from its original moral philosophical context, it is all but normal for the law of the codes to be suffering from chronic dysfunction.

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[1] With the notable exception, indeed, of Paolo GROSSI (ed.), *La seconda scolastica nella formazione del diritto privato moderno*, Atti del Incontro di studio (Firenze, 16-19 ottobre 1972), Per la storia del pensiero giuridico moderno 1, Milano, 1973, and luminaries like Robert FEENSTRA, Michel VILLEY and Franz WIEACKER who contributed to his volume.

[2] In the low countries, for example, Gordley's message has been received quite succesfully in recent years, with manuals for the study of the history of private law increasingly highlighting the legacy of the late scholastics. See, *inter alios*, Dirk HEIRBAUT, *Privaatrechtsgeschiedenis van de Romeinen tot heden*, Gent, 2005, and, even more abundantly, Jan HALLEBEEK, *Fons et origo iuris. Een historische inleiding tot het vermogensrecht*, Amsterdam, 2007, and Laurent WAELKENS, *Civium causa. Handboek Romeins recht*, Leuven, 2008.

In this presentation I will lead you to the heights of the late scholastic realm, a magic land to which I have set out inspired by the ideas of James Gordley, Robert Feenstra and Jan Hallebeek, amongst others. This journey would have remained a mental fiction, however, if the board of directors of the Marie Curie Program on the History of European Legal Cultures and my supervisors Laurent Waelkens and Italo Birocchi had not been willing to defy mainstream research in legal history by supporting a doctoral project focussing on original, unexplored Latin sources carrying a law which crosses national borders and which is profoundly intertwined with intellectual traditions that are not strictly legal in the modern sense[3]. Therefore, I would like to express my gratitude to all of them in the first place. Mobility, both in terms of crossing mental and physical spaces, is central to the Marie Curie program, so please allow me now to take you to the sky, where we will take a bird's eye-view of the fields I have been exploring like a worm during the past two years. *Leitmotiv* or *filo conduttore* during our flight will be the idea of *freedom*. For, the central conclusion ensuing from my research, after having run around the hermeneutic circle to the point where it made my stomach spin, clearly is that Leonardus Lessius' concept of the court of conscience, his contract doctrine, his economic thought as well as his pragmatic use of traditional authority can be explained on the basis of this one idea : *freedom*. As such, I do consider this principle to be the one that should form the thread holding together the different parts and chapters of my PhD, and, consequently, as the content matter that should determine its fundamental structure and form.

Apart from an introductory and concluding chapter, my thesis centers around the four themes just mentioned (the court of conscience ; general contract doctrine ; economic thought [through Lessius's discussion of particular contracts related to commerce] ; discourse analysis). In this presentation, I will touch on the two former themes, since the Groningen meeting of Belgian and Dutch legal historians gave you already a chance to catch a glimpse of Lessius's economic skills. As to Lessius' argumentation techniques, and his attitude towards authority, it would require of us far more close reading than is good for a swift and general introduction to his legal thought. Before we take off, a further preliminary remark is needed. You will notice no doubt that each of the main chapters of my PhD is apt to appeal in a bigger or lesser degree to a different readership : to historians of philosophy, law, economics, and philology respectively. Prominent scholars have already pointed out the pivotal role of Lessius in all of those fields. Stimulated by the mission statement of the doctorate in philosophy, history, sociology and anthropology of European legal cultures it is my explicit aim to put the rich diversity of these approaches together. Of course, the massive scope of this all-embracing perspective urges me to stick to Lessius and the early modern scholastic tradition he immediately draws from. This is a tradition whose immensity and richness still goes largely unnoticed, but which provides its explorers with thousands and thousands of unearthed folio-pages

[3] *Cf.* http://www.europeanlegalcultures.eu.

anyway. This reality will become obvious to you while flying above the first main theme of my thesis.

1. Conscience at the crossroads of law and morality : a basic grammar and vocabulary

Historical scholarship at its best is an irritating sort of thing. It frustrates conventional truths and categories, all too often rooted in prejudices of a confessional or political nature. It is equally true, of course, that historians like you and me are biased ourselves in writing history. Yet there is clear evidence that the concept we now have of « conscience » does not match altogether the reality it incarnated in 16th and 17th century scholasticism. Many a notion we now associate with the functioning of a court would right away have pertained to the semantic field of « conscience » as it was understood at that time : a judgment on the basis of rigid and technical argument, enforceability, the settling of disputes and the regulation of life in society. In fact, « conscience » was expressly deemed to be a court, a « forum », ruled by the law of nature. It was considered a tribunal parallel to the « external forum », for its part based either on ecclesiastical law, commercial law, statutory law, or yet another kind of specific positive law. Only in a very weak sense would people have considered the court of conscience as a playground of personal sentiments or feelings, let alone as a kind of weak inner space cultivated by priests and poets and philosophers but scornfully looked upon by the strong inheritors of Kelsen's positive law. Quite the reverse, in fact. A host of outstanding Italian historians have argued in recent years that the imperialistic and global promotion of the internal forum, the court of conscience, at the turn of the seventeenth century formed part of a strategy of the Catholic Church to create a universe of laws of conduct in all fields of life that would enable it to counter the growing body of positive state legislation issued by increasingly centralized non- or even anti-Catholic governments[4].

If states could conquer territories, the Church could conquer souls irrespective of the countries they were dwelling in. In according these souls inalienable rights by birth, and in making these natural rights-endowed subjects obey the rules of natural law - the expert interpreters of which were the learned men, that is the clerics, of course - the Church would be able to attack positive legislation from within. Now the storm troops of the Church were to be the newly founded Jesuit order (°1540), and one of its most eminent soldiers in one of the most turbulent and avant-garde regions at that time was Leonardus Lessius (1554-1623)[5]. He is deemed to be one of the most fervent defenders of mental reservation, amphibologia, and of lying, being

[4] See, for instance, Paolo PRODI, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna, 2000.

[5] On the life and times of Lenaert Leys, see Toon VAN HOUDT and Wim DECOCK, *Leonardus Lessius: traditie en vernieuwing*, Antwerpen, 2005.

tricky devices for escaping death under Protestant kings trying to convert Catholics in England and the Northern Netherlands, for example. His is the concept of subjective rights and of natural law later borrowed by Grotius, strictly separating natural law as the immutable dictate of reason from positive law as the changeable law laid down either by God or by man, and comprehending both divine law (Old and New Testament) and positive human law (ecclesiastical, statutory law, law of nations). At the same time, as top advisers of princes, merchants and the local beau-monde, the Jesuits stressed the need for local rulers to model their positive laws on the natural law prescripts they were uncovering through reason, and for judges in the worldly courts to apply some of the measures imposed by natural law through their « *officium iudicis* ».

Hence the emergence of nothing less than an immense yet so far largely ignored science of law in the wake of the Jesuits' conquest of the human soul. In contrast to the late scholastic tradition of the School of Salamanca, dominated by coryphaei of the Dominican order such as Vitoria and Soto, the treatises on justice and law of the Jesuit moral theologians prove to be much more indebted to the *ius commune* and to legal thinking in a much more technical sense. The treatises *De iustitia et iure* of Molina, Lessius, and Lugo display a startling amount of references to Roman and canon law, as well as to its standard commentators, postglossators as well as decretalists. Next to that, you will find them citing local positive law, customs and business practices, in an attempt to solve the most delicate and concrete problems in all fields of life before the court of conscience. As such, their concept of conscience clearly does not smack of softness or vagueness. Their manuals, aimed at helping the « judges » in the court of conscience, contained a general law of torts and contracts, ensuing from their restructuring of the *ius commune* around general principles of Aristotelian-Thomistic moral philosophy, such as the virtue of commutative justice, for example. By the mid-17th century, this would lead the Jesuits to write even more vast treatises on all branches of private law. To be sure, historians do widely acknowledge the exceptional role of Jesuits like Ferdinand Verbiest and Athanasius Kircher in the development of China-studies, astronomy, calculus and medicine. Yet Pedro de Oñate's (1568-1646) four-volume treatise *De contractibus* on general contract law, the law of lucrative contracts, and the law of synallagmatic contracts is hardly ever heard of, although it has been influential in both Europe and South America. Another attempt to create a real science of law, seeking to provide judges in both the internal and external fore with state-of-the-art legal wisdom, was made by Joseph Gibalin (1592-1671). Gibalin taught at the college of Lyon and published an impressive *Scientia canonica et hieropolitica*, as well as an incredibly vast treatise covering all of commercial and contract law *De universa rerum humanarum negotiatione tractatio scientifica*.

Science. The Jesuits wanted to construct an all-encompassing science of law, borrowing from all existant legal traditions but ultimately transforming them around general principles derived from natural law. As such, they intended to build a normative universe parallel to the one increasingly provided by the state. The court

of conscience was to be its main place of enforcement. Now this is a moment where another prejudice might come in : doesn't all this mean that a heavy extra burden was placed on Catholics across the Globe ? For the standards that need to be met before the court of conscience are much loftier and heavier than the standards set by public authority, aren't they ? Well, I am afraid they are not necessarily so. They are more rational, consistent, and predictable, for one thing, since they are based on reason, not on the whims of governments. And they are more respectful of human freedom as a basic right of man, for another. One should not forget that at the heart of Jesuit moral theology and law of the early modern period, we find an exceptionally optimistic anthropological view as well as a model of problem solving highly indebted to a freedom-based view of human agency : « probabilism »[6].

How should I behave according to natural law in a particular case ? This is the basic question to be solved. In principle, a combination of sound reasoning on the basis of some natural principles included in human nature (e.g. someone's need to survive, his sociability, etc.), as well as a sharp eye for concrete circumstances should enable a clever Jesuit like Lessius to discern the answer to the majority of ethical questions in a fairly easy way. However, such a naive and simple account of ethics would fail to take into account one basic feature of human reason : its fallible nature due to the fall of man from Paradise. As Soto noted, in its practical analysis of natural law, fallible right reason cannot derive absolute certainties nor indisputable moral precepts. Man can merely formulate frail opinions about the existence and the extent of a natural-law imperative. He can only persuade himself of the respective probability of these opinions, with probability depending either on sound argument, or on authority. As a consequence, the question of how we should behave, be it in concluding a testament or in observing Lent, is to be solved within a context of fundamental doubt and uncertainty. Now this is the point where a random sentence of the Digest, also figuring in the rules of law formulated by Pope Boniface VIII, comes in : *melior est conditio possidentis* (the position of the possessor is the stronger one) [7]. It should not come as a surprise, that the Spanish had transformed this random sentence into a general principle of property law before tackling the question, put forward by emperor Charles V 'after' the conquest of the Americas, whether the Spanish could feel secure about their claimed ownership over the land previously belonging to the indigenous people. It is surprising, though, when in the second half of the seventeenth century we hear the Jesuit Antonio Perez (1599-1649) stating that the « *melior est conditio possidentis*-rule » of the *ius commune* has been

[6] On probabilism, see the magnum opus of Rudolf SCHÜSSLER, *Moral im Zweifel*, Paderborn, *Band I: Die scholastische Theorie des Entscheidens unter moralischer Unsicherheit*, 2003, and *Band II: Die Herausforderung des Probabilismus*, 2006.

[7] Dig. 43, 33, 1, 1 (Julianus) : « *Melior est conditio possidentis* » and Lib. 6, reg. iur. 65 : « *In pari delicto vel causa potior est conditio possidentis*. »

the one and unique cornerstone on which the whole building of Jesuit moral theology and law had been founded[8].

As a matter of fact, one comes across this basic principle quite frequently in Lessius. He denies, for instance, that the beneficiary of a testate succession that fails to meet the formal requirements would need to render the testator's property to the inheritor ab intestato. To support his claim, he expressly makes reference to the « *melior est conditio possidentis*-rule »[9]. Yet on a more general level, this rule proves to be even more fundamental. With regard to the question whether in a case of doubt an obligation stemming from natural law exists at all, absent any particular conflict between men, Antonio Perez sums up the view which Suarez, Bonacina, Sanchez and many other Jesuits have taken as follows : « *dubitans est possessor suae libertatis* » (even in doubt, you are still the possessor of your liberty). Take « *melior est conditio possidentis* » as a maior, with « *dubitans est possessor suae libertatis* » as a minor of the most simple syllogism, and what you get is that human freedom always prevails against any doubts about the existence of a possibly burdensome natural law obligation. Freedom is the basic condition of man. Its position resembles that of a plaintiff in a lawsuit, and thus, according to Perez, the onus is on the natural law which claims to limit the original freedom of men. If you wonder whether Lent has begun, then, because you do not possess any clear indication as to date nor time, you are still free to eat meat. Such was the startling conclusion, or rather the point of departure of Jesuit legal and moral thought. A point of departure radically different from traditional moral and canonical thought up to late scholastics such as Soto. They took what is known to be a 'tutioristic' stand, which means that they would choose the safer opinion (*opinio tutior*). The safer opinion being to suppose that there is a law in case you doubt about the existence of this very law. Lessius and many other Jesuits did disagree with this traditional line of thought. Significantly, the Jesuit Antonio Perez expressly points out the rationale behind the Jesuits backing the probabilistic stand instead : « *quia favent libertati operandi, et ab innumeris obligationibus homines liberant* » (they favour freedom of action and free mankind from innumerous obligations)[10].

It would be inappropriate for us to dwell on the anthropological, theological and even strategic reasons behind the early modern Jesuits' optimistic defence of freedom. Let me just point out that a « We are free »-slogan turns out to be hugely compatible with a yet more famous one : « Yes we can »… To sum up, then, we should answer in the negative our original question of whether the erection of a normative universe parallel to the one of the state and backed up by a court of conscience necessarily places an excessive burden on Catholics dispersed over state

[8] Antonio PEREZ, *De iustitia et iure et de poenitentia opus posthumum*, Romae, 1668, tract. 2, disp. 2, cap. 4, num. 78, p. 174.
[9] Leonardus LESSIUS, *De iustitia et iure*, Antverpiae, 1621, lib. 2, cap. 19, dubit. 3, num. 21, p. 238.
[10] PEREZ, *De iustitia et iure*, *l.c.*

territories. Granted, Lessius's *De iustitia et iure* features an idea of positive law as a reduced quantity of the total of obligations ensuing from natural law. Not all natural law obligations can be turned into civil law obligations for pragmatic reasons : the judicial system would simply be unable to cope with the higher number of lawsuits due to the higher number of possible violations of civil law obligations. But we should not always think of positive law in modern terms either. The present Belgian penal code, for example, includes a paragraph making it an obligation to help a co-citizen in great need, as when he is drowning. If you do not, you are not just a dishonourable person, but you will be punished in court[11]. Discussing the same question, however, Antonio Perez, drawing on Lessius, plainly states that there cannot be any obligation whatsoever as a matter of justice to run to the rescue of a fellow human being. There could well be an obligation as a matter of charity, of course, but no obligation enforceable before the court of conscience exists. For you have the entire dominion over your liberty (« *quilibet est perfecte dominus suae libertatis* »)[12]. In this manner, no one can claim something from you as a matter of justice, unless you have transferred to him a right over a very specific and limited part of your freedom by means of a contract or quasi-contract (e.g. deriving from your « officium », namely the deontological obligations following from your belonging to a certain class of people).

2. General contract doctrine

The gateway leading us to the second main part of my PhD territory, is flanked by two columns : one at its left hand side, featuring a statue of justice, and another one at its right hand side, with a statue of liberty on top of it. An obvious welcome, indeed, given that the two main principles ruling Lessius's contract doctrine are the principle of commutative justice and the principle of free and mutual consent. Though we are used to the latter concept, the former might strike us as an unwelcome substrate of times when contractual freedom was still being choked by the incense of a religion and philosophy eager to break the projects of individuals. To be sure, a relict of it is still to be found in the random application of the idea of gross disparity and unconscionability, but as a general principle inequality definitely was removed from our codes for the sake of contractual freedom - thus runs a common proposition. Nevertheless, we will see that the tribute paid by the early modern scholastics to the Aristotelian-Thomistic virtue of commutative justice was exactly the catalyst to set free a host of contracts and accessory pacts hitherto deemed unenforceable or illicit by Roman-canon law. Once again, some Socratic midwifery will prove very helpful in overcoming traditional prejudices about « scholasticism ». Rather than suffocating the law, scholasticism as a systematic method of doing research in academia provided the early modern scholastics with the tools to adapt traditional structures to new real life circumstances.

[11] Cf. art. 422bis SW.
[12] PEREZ, *De iustitia et iure*, tract. 2, disp. 3, cap. 7, num. 123, p. 236.

A key principle of the scholastic method consists in defining your terms before starting an argumentation, as well as demonstrating that you are thoroughly acquainted with past scholarship before you start and pretend to know everything much better. Now that is exactly the way in which Lessius sets out to discuss general contract theory, before launching his own natural law based doctrine rooted in promise. In sketching the established *ius commune* teachings on contract, however, Lessius already points out some of the cracks in the old building compared with his own natural law doctrine. Though quoting the time-honoured Labean definition of contract as *synallagma* or mutual obligation, Lessius slightly modifies the formula in calling contract merely an external sign of practical significance producing an obligation for both parties to the contract on account of their mutual consent (*contractus est signum externum practicum, ultrocitroque obligationem ex consensu contrahentium pariens*)[13]. Next, he opens up the definition to the effect that it also includes unilateral contracts, like donation, only to finish by saying that, personally, he takes « contract » to be synonymous with « pact ». As such, any mutually accepted expression and coincidence of wills (*duorum consensus atque conventio*) is to be considered enforceable. At which point Lessius stresses the need for the externally expressed wills to be mutually accepted. Otherwise we are not dealing with a pact, but rather with an unbinding promise. It is precisely his stressing the need for acceptance along with the offer to get a binding contract, which makes Lessius a unique harbinger of a fundamental principle of present day contract doctrine[14].

Yet despite the glimpses of innovation surprising us right from the outset, the traditional Roman categories of enforceable contracts, and the Medieval doctrine of the *vestimenta pactorum* are reviewed first. Interestingly, every now and then Lessius compares the ius commune with natural law doctrine. In marked contrast to the Roman law teachings on error, for example, Lessius makes a huge effort to demonstrate that from a natural law point of view, the distinction between *contractus bonae fidei* and the *contractus stricti iuris* concerning mistake does not hold water. In both cases, he argues, mistake which gave rise to the contract results not in absolute but rather in relative nullity in favour of the mistaken party. By making reference to Jean Feu and Pierre de Belleperche, and by reinterpreting Digest 4, 3, 7 and Codex 8, 38, 5, Lessius seeks to demonstrate that even Roman law would not consider a *contractus bonae fidei* to be utterly void but rather voidable at the option of the mistaken party[15]. The final motivating factor behind his advocacy for an equal treatment of the formerly distinguished types of contract is that the common good (*bonum commune*) demands it. For along these new lines a contract is

[13] LESSIUS, *De iustitia et iure*, lib. 2, cap. 17, dubit. 1, num. 2, p. 195.
[14] *Cf.* Reinhard ZIMMERMANN, "Ius commune. Europäische Rechtswissenschaft in Vergangenheit und Gegenwart", in Dirk HEIRBAUT and Georges MARTYN (ed.), *Napoleons nalatenschap: Tweehonderd jaar Burgerlijk Wetboek in België /Un héritage napoléonien : Bicentenaire du Code Civil en Belgique*, Mechelen, 2005, p. 408, n. 182.
[15] LESSIUS, *De iustitia et iure*, lib. 2, cap. 17, dubit. 5, num. 31, p. 199.

still binding, in case the mistaken party disclaims his right to nullify the contract, for instance because he actually benefits from it. In this way, the legal system could frustrate the attempts made by unscrupulous gamblers who first by fraudulent means entice the other party into a contract only to defend themselves against the action of the winner upon losing the game by claiming that the contract was void. This constituted a massive problem in his time, as Lessius explains further on in a chapter on gambling and contracts of chance.

Still another, obvious discrepancy between Roman law, canon law, statutory law and natural law regards the question whether a « nude pact » is binding. Lessius cannot help but note that by the time he is writing his treatise, namely at the end of the 16th century, this actually is an outdated question. For in any court in the Netherlands and Spain, the principle that all pacts are binding (« *pacta quantumcumque nuda sunt servanda* ») has long been introduced through custom and common judicial practice. Nevertheless he contents himself by pointing out the usual rationale behind the non-enforceability of any pact in traditional Roman law : *ne lites multiplicarentur* (lest the judicial system is overloaded). And he maintains that on the basis of praetorian actions, Roman law had already attained a general enforceability of all pacts too. As for the classical canon law, he points out the requirement of « causa », the absence of which gives rise to a presumption of error or fraud. Before the court of conscience, however, any intent of a promisor to obligate himself as a matter of justice which is outwardly communicated to and accepted by the promisee entails enforceability.

Does that mean Lessius conceived of contractual liberty in the widest of senses - a term (*libertas contractuum*[16]) he explicitly uses himself, by the way? Generally speaking, I would say so, granted that the usual and present day qualifications about the (relative) nullity of contracts going against positive law were also recognized by Lessius, of course. Yet we should not commit the mistake of overstating this qualification about the material side of contractual liberty. A lease remains valid, according to Lessius, even though the incoming tenant can readily be estimated to be renting a house for immoral purposes, that is, even though the *causa finalis* of the contract on the part of the tenant is to accomodate prostitutes or usurers. Even canon law regulations concerning this matter have been abolished by custom, he admits[17]. In addition, Lessius repeats time and again that even if a certain act which constitutes the object of the contract is totally unlawful, still the accompanying contract may be valid *post patrationem*. At least from the moment the act has been fulfilled, a contract *ob turpem causam (materialem)* is valid. In this manner, Lessius expressly aims at preventing prostitutes or contract killers from rendering their services without being paid afterwards. In no way are these types of contract to be considered gratuitous. Consequently, as in any other onerous contract, a prostitute or murderer should get the right equivalent to his or her performance. For, we should

[16] LESSIUS, *De iustitia et iure*, lib. 2, cap. 17, dubit. 6, num. 43, p. 203.
[17] LESSIUS, *De iustitia et iure*, lib. 2, cap. 24, dubit. 8, num. 41, p. 330.

not only consider the intrinsic evil of the act performed, according to Lessius, but also the labour, risks and damages that were suffered, as well as the fidelity, lust and usefulness that were offered to the other contracting party. All of these services have a price, which, as a matter of commutative justice, should be paid to the perpetrator[18].

So much for the material side of contractual liberty, which in principle is free and open, as one must conclude. But what about formal aspects governing the law of contracts ? Did Lessius really conceive of consensualism as the general basis of contractual obligation before the court of conscience? Again, I would submit that he did so. A good test-case proves to be the question we already touched upon in discussing the all-pervasiveness of the « *melior est conditio possidentis*-rule »: Is it lawful for a beneficiary of a testate succession that fails to meet the formal requirements to retain the testator's property instead of rendering it to the inheritor ab intestato ? In fact, it was commonly acknowledged in Lessius's time that the absence of the normally required solemnities would not affect the natural obligations ensuing from a testament *ad piam causam*. Even before the external, ecclesiastical court, formalities had already been reduced to a minimum by Pope Alexander III - an intervention Lessius defends on account of the indirect secular power of the Church. The crux of the debate, however, was the question whether testaments *ad causam non piam* could also produce a natural law obligation. Put differently, whether a general principle of non-formality existed before the court of conscience ? Diego de Covarruvias y Leyva took the view that a purely consensual testament could only obligate as a matter of natural law in an improper sense, that is, as a matter of honesty (*ex honestate*). As a consequence, the testate possessor could not defend himself, not even before the court of conscience, since he had not been conferred a right on the inheritance. Re-interpreting canon law by means of the equity-principle, though, Lessius radically opposed Covarruvias's view. According to him, a purely consensual testament does obligate as a matter of natural law in its proper sense (*ex iustitia*), meaning that it does confer a right on the testate possessor. Therefore, the latter could claim to retain the inheritance before the court of conscience, though in theory he could not in a secular court. To explain the distinction between the different courts, Lessius expressly draws a parallel with naked pacts here. They, too, confer a right. They are not merely binding on the grounds of honesty[19].

Now this takes us to a question of the utmost importance. How is a contract formed, and what constitutes the source of its obligating force before the court of conscience ? People tend to say that, of course, pacts were always binding before the court of conscience in the « Middle Ages ». God would want them to be. A promisor had a « moral duty » to keep a promise. That is how a contract came to be honoured. Yet I cannot support those duty- or God-oriented explanations, when confronting

[18] LESSIUS, *De iustitia et iure*, lib. 2, cap. 18, dubit. 3, num. 19, p. 218.
[19] LESSIUS, *De iustitia et iure*, lib. 2, cap. 19, dubit. 3, num ; 26, p. 239.

them with what the original Latin texts are telling us. To be sure, man can bind himself towards God (*ex religione*) by swearing an oath (*iuramentum*), but Lessius clearly thinks of contracts as a distinctly human affair, definitely when it comes to finding a reason why a contracting party should honour a contract. What we are witnessing here might be an important moment in the history of secularization, one could be tempted to say. For one thing, contrary to Soto, Molina, Ledesma, and many other a late scholastic, Lessius did not believe that an uncommunicated unilateral promise could entail a natural obligation. Locked up in our brains, a promise regarding a gratuitous or onerous act towards another human being cannot possibly bring forward any obligation on either side. Lessius thinks only an exterior act, namely speech or another external sign, is able to effectuate the interior intent which it signifies[20]. Or to put in the terms of Ferdinand De Saussure, signifier and signified are mutually dependent on each other with regard to their existence. Remember Lessius's modified version of the Labean definition of contract ?

However, it does not suffice for a promisor to exteriorize his intent to the promisee. A second condition in the formation of a binding contract is its acceptance by the promisee. This might strike you and me as an obvious requirement, but Lessius had a hard job refuting the counterarguments brought forward by luminaries such as Covarruvias and Molina. According to a long-dated tradition, Roman law had recognized the enforceability of unilateral promises (*pollicitationes*) in a few cases, one of which is the unilateral promise to pay money to the municipality (*pollicitatio civitati*). Applying the common maxim that a civil obligation cannot exist unless at the same time there is a natural obligation lying behind it, Molina had inferred from the above said that as a general rule natural law recognizes the enforceability of a unilateral promise, absent consent of the promisee. Unable to attack the common maxim underpinning Molina's logic, Lessius had to deny that Roman law was actually saying what it was held to say according to tradition. He interpreted the passages in Dig. 50, 12 to mean that civil law only prohibited the promisor from revoking his promise[21]. Even a civil law obligation could only come into existence, though, from the moment the municipality did accept the promise. Roman law had not attributed an obligating force to the unilateral promise, then. Therefore, Lessius could claim that there was no natural obligation either. Having countered this solid argument based on Roman law, Lessius could simply quote his definition of pactum as *conventio*, or the meeting (*con-venire*) of two distinct wills, to demonstrate that consent of both parties to the contract was required.

The ultimate reason behind Lessius's innovative view of contract formation, is that he takes a very « balanced » or « equilibrated » view of contract. Basically, he considers a contract as the conferring of a right (*ius*) on the promisee to which corresponds a debt (*debitum*) on the side of the promisor[22]. In other words, contract

[20] LESSIUS, *De iustitia et iure*, lib. 2, cap. 18, dubit. 5, num. 30, p. 219.
[21] LESSIUS, *De iustitia et iure*, lib. 2, cap. 18, dubit. 6, num. 40, p. 220.
[22] LESSIUS, *De iustitia et iure*, lib. 2, cap. 18, dubit. 8, num. 52, p. 224.

is a matter of commutative justice. As such, its enforceability too is a matter of commutative justice. Again, this is not an obvious conclusion. Tommaso de Vio Cajetanus, for example, had argued that a contract is binding only as a matter of honesty and truth. This is a far more unilateral view of contract, making the enforceability of a contract depend on the duty of the promisor to observe his promises. In Lessius's view, however, the promisee has been conferred a right, which enables him to take hold of a piece of liberty of the promisor. He is not dependent on the good faith and willingness of the promisor to enforce the contract. Molina, on the other hand, had stressed the intention of the promisor : the binding force of a promise depends entirely on the extent to which the promisor wanted himself to be bound. If a promisor only wants to be bound as a matter of truth and honesty, the promisee will not have a legal claim to performance. He will have such a claim, however, if the promisor intends to bind himself as a matter of justice. Lessius too recognizes that the extent of contractual obligation somehow depends on the intention of the promisor. For example, by promising he may only intend to show his sympathy towards the other party. Yet as a general principle in important matters (*materiae notabiles*) Lessius thinks every contract should be binding as a matter of strict justice (*omnis obligatio contractuum est obligatio iustitiae*)[23]. The idea of commutative justice cannot necessarily be considered, then, as a restraint on the development of modern contract doctrine. It even brought the late scholastics to reflect on what is now considered to be the reliance principle in contracts. Even though they thought that the extent of contractual obligation should be determined by the will or intent of the promisor, they recognized that a promise should give rise to a claim for damages if the promisee had relied on the form and wording in which the intent had been declared.

The Aristotelian-Thomistic principle of equilibrium and equality in exchange dropped a big bomb, then, in the traditional realm of the *ius commune*. It supported the development of a host of economic ideas, too, and the breakthrough of a business morality compatible with the flourishing of commercial capitalism[24]. And it won't come as a surprise to you, I guess, that at the outskirts of my PhD land you will see Lessius devising a host of argumentation techniques to defend himself against traditional legal and theological authority. However, before bombs rain on us from the sky, I would suggest that you come down and prepare for a safe landing. As a concluding testimony to the incredible defence of contractual liberty Lessius and other early modern Jesuits stood for, let me just finish by quoting Pedro de

[23] LESSIUS, *De iustitia et iure*, lib. 2, cap. 18, dubit. 8, num. 55, p. 224.

[24] I have developed this argument in "L'usure face au marché: Lessius (1554-1623) et l'escompte des lettres obligataires", in Anne GIROLLET (ed.), *Le droit, les affaires et l'argent. Célébration du bicentenaire du code de commerce*, MSHDB, 65 (Dijon, 2008), p. 221-238 and "Lessius and the Breakdown of the Scholastic Paradigm", in *Journal of the History of Economic Thought,* 31 (2009), p. 57-78.

Oñate. In one of the opening chapters of his volume on general contract doctrine, he has it that[25]:

> A vast number of irritating and useless disputes and lawsuits have been removed thanks to the conformity of natural law, canon law and Spanish law with regard to the enforceability of naked pacts. In the most sensible way, *liberty* has been restored to the contracting parties, so that whenever they want to enter into whatsoever a contract in whatever way, their freely made agreement will be enforced before any court they want.

[25] Pedro de OÑATE, *De contractibus*, Romae, 1646, tom. 1, disp. 2, sect. 5, num. 166, p. 40.